Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast	)	
Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

COMMENTS OF COX RADIO, INC.

Kevin F. Reed
Elizabeth A. McGeary
Nam E. Kim

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

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SUMMARY

Sections 202(b) and 202(h) of the Telecommunications Act of 1996 prohibit the Commission from re-regulating the radio industry by adopting new restrictive multiple radio ownership rules. First, Section 202(b) instructed the Commission to change its local radio ownership rules as directed, and the Commission may not now try to circumvent the statute by modifying the definition of "radio market." Second, Section 202(h) directed the Commission to review its broadcast ownership rules every two years and to eliminate any that do not affirmatively serve the public interest. The D.C. Circuit has interpreted Section 202(h) to require the Commission to eliminate ownership rules unless harm to competition or diversity exists. Here, where no harm will or can be shown, the Commission lacks the statutory authority to tighten the rules.

The Commission's policy of "flagging" public notices of radio station transactions that, based on an initial analysis by Commission staff, propose an allegedly "excessive" level of concentration also is inconsistent with the specific directives of Congress and therefore must be rescinded. The Commission should defer to the expertise of the Department of Justice and state antitrust agencies to review transactions based on competition and antitrust concerns.

Finally, the Commission should not require pre-approval of local marketing agreements or time brokerage agreements or attribute joint sales agreements to the sales agent. Requiring that LMAs and TBAs be reviewed in advance would be administratively burdensome and is likely to deter parties from entering into such arrangements. With respect to JSAs, the Commission has previously determined that such agreements should not be considered attributable provided they comply with certain requirements. The Commission cites no basis or change in circumstances warranting modification of this policy.

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To: The Commission

COMMENTS OF COX RADIO, INC.

Cox Radio, Inc. ("Cox"), by its attorneys, respectfully submits its Comments in response to the Commission's *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making* ("*Further Notice*")[1] regarding the multiple ownership of radio broadcast stations in local markets. Cox, either directly or through wholly-owned subsidiaries, owns and operates over eighty AM and FM radio stations throughout the United States, and thus has a significant interest in this proceeding.

Cox respectfully urges the Commission to refrain from imposing additional local radio ownership restrictions. Any action to tighten current restrictions would be contrary to the Commission's statutory authority under Sections 202(b) and 202(h) of the Telecommunications Act of 1996. The Commission also should not seek to increase the level at which it reviews

[1] *In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets*, *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making*, MM Docket Nos. 01-317 and 00-244, FCC 01-329 (rel. Nov. 9, 2001) ("*Further Notice*").

transactions based on competition concerns. Competition issues are adequately handled and should be handled by the Department of Justice and state antitrust agencies. Finally, no basis exists for the Commission to overturn its current policies by requiring pre-approval of local marketing agreements or time brokerage agreements or by attributing joint sales agreements to the sales agent.

I. BACKGROUND

Section 202(b) of the Telecommunications Act of 1996 (the "Telecom Act")[2] directed the Commission to revise its rules to increase the number of radio stations that could be owned by a single entity in a local area. In Section 202(h) of the Telecom Act, Congress directed the Commission to reexamine its broadcast ownership rules on a biennial basis and eliminate those rules that are no longer in the public interest.[3]

The Commission responded to these Congressional directives with respect to the local radio ownership rule by (1) issuing an order in March 1996 adopting the statutory language in Section 202(b) to govern the ownership of multiple radio stations in a local market[4] and (2) addressing in its *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* proceeding ("*Biennial Review*") "whether the local radio ownership rule was 'necessary in the public interest as a result of competition.'"[5] In the *Biennial Review*, the

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(H) Title II, 110 Stat. 56, 111 (1996).

[4] *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), Order*, 11 FCC Rcd 12368 (1996).

[5] *Further Notice* at ¶ 15 (quoting *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of*

continued…

Commission decided to initiate a rulemaking to examine its current methodology for defining radio markets to restrict further consolidation in the broadcast industry.[6] Accordingly, in December 2000, the Commission issued a *Notice of Proposed Rule Making* to examine its definition of radio markets ("*Notice*").[7] The majority of commenters participating in that proceeding urged the FCC to retain the current definition. The Commission did not issue a decision in that rulemaking and instead consolidated it with the instant *Further Notice* which undertakes a comprehensive examination of the Commission's multiple radio ownership rules and policies in light of current marketplace conditions. In the *Further Notice*, the Commission requests comment regarding its statutory authority to adopt more restrictive multiple radio ownership rules and proposed changes to its regulatory treatment of local marketing agreements, time brokerage agreements, and joint sales agreements.

II. THE TELECOM ACT PROHIBITS THE FCC FROM TIGHTENING THE RADIO OWNERSHIP RULES.

A. The Commission May Not Circumvent Section 202(b) of the Telecom Act By Redefining the Term "Radio Market."

In the *Further Notice*, the Commission seeks comment whether Section 202(b) constrains its authority to revise the definition of radio markets[8] and the multiple radio ownership rules in

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the Telecommunications Act of 1996, Notice of Inquiry, 13 FCC Rcd 11276, ¶ 1 (1998) ("*Biennial Review Notice of Inquiry*").

[6] *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd 11058, ¶ 68 (2000) ("*Biennial Review*").

[7] *Definition of Radio Markets, Notice of Proposed Rulemaking*, 15 FCC Rcd 25077 (2000) ("*Notice*").

[8] *Further Notice* at ¶ 62.

general.[9] Cox respectfully submits that it does. The plain mandate of Section 202(b) simply does not permit the Commission to alter its method for defining radio markets or to make any other changes in the rule to restrict ownership.

In the Telecom Act, Congress directed the Commission to revise its rules to increase the number of radio stations that could be owned by a single entity in a local area. As the Commission observed when it issued the order implementing Section 202(b) in 1996, "prior notice and an opportunity for public comment were unnecessary because the "rule changes *[did] not involve discretionary action on the part of the Commission*, [but] simply implement[ed] provisions of the Telecom Act that direct the Commission to revise its rules according to the specific terms set forth in the legislation."[10] Moreover, as the Commission determined in 2000, "While some commenters argue that we should tighten the [local radio] ownership limits, we do not believe this appropriate given that Congress directed the Commission to adopt these limits in 1996."[11] Nothing has changed.

The Commission may not circumvent the statutory mandate of Section 202(b) by redefining the definition of "radio market." Neither the Telecom Act nor its legislative history provides any indication that Congress intended the Commission to alter any other key elements of the rule including the methodology for defining a radio market. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation

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[9] *Id.* at ¶¶ 22, 24-27.

[10] *Id.* at ¶ 14 (emphasis added).

[11] *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, *Biennial Review Report*, 15 FCC Rcd 11058, ¶ 60 (2000).

is persuasive evidence that the interpretation is the one intended by Congress.'"[12] Thus, for example, when using the term "radio market" in the Telecom Act, Congress could have only intended to incorporate the Commission's definition of radio markets that was in effect at the time.

Furthermore, before Congress could decide to increase the number of radio stations that could be owned in a market, it would have had to be cognizant of the ownership rules' basic components including market definition. To assume that Congress intended to increase the number of radio stations that could be owned in a market but did not expect the market measure to remain constant would be illogical. Otherwise, Congress's decision to increase the number of radio stations that an entity could own would be meaningless and ineffective if the Commission could alter the baseline simply by redefining the measure of a radio market or making other changes to the rule.[13] In the absence of any definition set forth in the Telecom Act, Congress could only have intended that the definitions and elements of the rule in effect at the time would continue in force. As an administrative agency, the Commission may not ignore the specific dictates of a statute and must enforce the statute as written.[14] In light of the above, the Commission holds the burden of justifying its authority to revise the definition of a key term of the Telecom Act.

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[12] *CFTC v. Schor*, 478 U.S. 833, 845 (1986) (*quoting NLRB v. Bell Aerospace Co*., 416 U.S. 267, 274-75 (1974)).

[13] *See also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.")

[14] *See Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1361 (D.C. Cir. 1988).

The Commission appears to be attempting to revise the rules primarily to restrict further consolidation to assuage fears that too much consolidation in the radio industry has taken place since 1996. Yet, this consolidation is fully consistent with the Telecom Act and could hardly have come as a surprise to Congress. Congress' intent in passing the Telecom Act generally was to decrease the level of governmental regulation and artificial constraints on broadcast ownership.[15] The radio industry had already undergone significant (and well-publicized) consolidation since 1992 as the result of an earlier relaxation of the rules.[16] Congress therefore must have known that by relaxing the ownership restrictions, further consolidation would likely occur. The Commission's goal of restricting consolidation runs contrary to the policy decision made by Congress in 1996 that the public interest would benefit from the relaxation of the local radio ownership rules and that the resulting levels of diversity and competition would be appropriate. By proposing such restrictions and, in effect, amending Section 202(b) of the Telecom Act, the Commission would be circumventing the statutory scheme.

[15] *See Fox Television Stations, Inc. v. FCC*, 2002 U.S. App. LEXIS 2575, *4 (Feb. 19, 2002) (In 1996, "Congress set in motion a process to deregulate the structure of the broadcast and cable television industries. The [Telecom] Act…eliminated the national and relaxed the local [radio] restrictions upon ownership").

[16] The consolidation of the radio industry after the Commission revised its radio regulations in 1992 was well-publicized. *See, e.g.*, *Radio Stocks Rise as Limits On Owners Ebb*, THE NEW YORK TIMES, Dec. 25, 1995, at 53 ("Predicting a post-deregulation growth spurt for radio companies seems safe. When ownership rules eased in 1992, allowing radio companies to rise to the present limit, an earlier round of station-swapping took place"); Tony Sanders, *Transaction Digest*, RADIO BUSINESS REPORT, Nov. 27, 1995, at 16 (regularly published article reporting recent radio transactions); *Acquisitions Spur Stock Price Growth for Public Radio Groups*, RADIO BUSINESS REPORT, Oct. 16, 1995, at 14 (discussing recent radio acquisitions). After Congress passed the Telecom Act, the press predicted further consolidation. *See, e.g.*, *From Duop to Dereg: House, Senate Usher In a New Era for Radio*, RADIO BUSINESS REPORT, Feb. 5, 1996, at 2, 4 ("Last Thursday, the House and Senate passed a telecommunications bill that will usher in sweeping ownership deregulation of the radio industry." "RBR observation:… Under the just-passed legislation, there will be fewer owners."); Jonathan Tasini, *The Tele-Barons;*

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B. Section 202(h) of the Telecom Act Prohibits the Commission From Tightening the Radio Ownership Rules.

In the *Further Notice*, the Commission requests comment on the relationship of Section 202(h) of the Telecom Act and its statutory authority to revise the multiple radio ownership rules as part of its biennial review process. As the D.C. Circuit recently explained in *Fox Television Stations, Inc. v. FCC* ("*Fox Television Stations*"), Section 202(h) requires the Commission to deregulate, not tighten, the ownership restrictions and retain a rule only if the public interest otherwise would be harmed. Moreover, even if Section 202(h) permitted the Commission to tighten the local radio ownership rules, no evidence of harm to competition or diversity exists to "demonstrate that the recited harms are real, not merely conjectural," and warrant a change in the rules.[17]

1. Section 202(h) requires the Commission to relax or eliminate ownership rules unless a rule is necessary in the public interest.

Section 202(h) requires the FCC to review its ownership rules on an ongoing basis and to eliminate those that no longer are in the public interest.[18] In adopting Section 202(h) as part of the Telecom Act, Congress briefly discussed the history of broadcast regulation. Congress recognized that broadcast ownership rules "were promulgated to ensure that the American

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Media Moguls Rewrite the Law and Rewire the Country, THE WASHINGTON POST, Feb. 4, 1996, at C01 (The bill "will almost surely set off a new wave of mergers and alliances.").

[17] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("*Time Warner II*") (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

[18] Telecommunications Act of 1996, Pub. L. 104-104, § 202(H) Title II, 110 Stat. 56, 111 ("The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.")

consumer received audio and video programming from a variety of sources utilizing a scarce resource, the radio frequency spectrum."[19] Congress found, however, that there have been significant changes in the video marketplace over the past fifty years such that "the scarcity rationale for government regulation no longer applies."[20] Accordingly, by adopting Section 202(h), Congress intended for the Commission to "depart from the traditional notions of broadcast regulation and to rely more on competitive market forces. In a competitive environment, arbitrary limitations on broadcast ownership and blanket prohibitions on mergers or joint ventures between distribution outlets are no longer necessary."[21] By shifting the burden of proof with respect to the structural ownership rules, Congress signaled that the tide of broadcast ownership rules had reached the high water mark and must recede unless the Commission justified retention of the rules.

As the D.C. Circuit recently explained in *Fox Television Stations,* by instructing the Commission to repeal or modify any regulation that is no longer in the public interest, the biennial review process "set in motion a process to *deregulate* the structure of the broadcast and cable television industries."[22] The court continued, "[I]n § 202(h) of the Act, the Congress instructed the Commission, *in order to continue the process of deregulation*, to review each of the Commission's ownership rules every two years."[23] Indeed, the court characterized the

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[19] Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat. 56, 111) 18 (legislative history of the broadcast ownership provisions of the Telecommunications Act of 1996).

[20] *Id.*

[21] *Id.* at 19.

[22] *Fox Television Stations, Inc. v. FCC*, 2002 U.S. App. LEXIS 2575, *4 (Feb. 19, 2002) (*"Fox Television Stations*") (emphasis added).

[23] *Id.* at *5 (emphasis added).

Commission's mandate as "full speed ahead" rather than wait-and-see.[24] Accordingly, there can be no doubt that the Commission has the burden of justifying that broadcast ownership restrictions remain necessary, and it must repeal or loosen regulations that can no longer be justified under Section 202(h).[25] In short, these judicial and legislative standards do not contemplate implementing additional restrictions on ownership.

2. Competition and diversity issues do not warrant the proposed changes in the rules.

In the Telecom Act, Congress made the policy decision that free markets and competition, rather than government-imposed regulation, best promote the public interest. Recognizing this Congressional mandate, the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC* ("*Time Warner II*") confirmed that those who would retain structural media ownership restrictions face a high hurdle: they must show with "substantial evidence" a public harm that the ownership restriction will help cure.[26] Those who would tighten existing ownership restrictions face an even higher hurdle: they must provide an "affirmative justification" for even a minor "tightening of the regulatory screws."[27] Absent an empirical record demonstrating harms to competition or diversity resulting from the Commission's existing radio ownership restrictions, the Commission quite simply has no basis for increasing those restrictions.

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[24] *Id.* at *32.

[25] *See* Telecommunications Act of 1996, Pub. L. 104-104, § 202(H) Title II, 110 Stat. 56, 111.

[26] *Time Warner II* at 1133.

[27] *See id.* at 1143.

The record in this proceeding has shown, and will continue to show, that any "tightening of the regulatory screws" would not withstand judicial review.[28] Consequently, even if Section 202(h) of the Telecom Act permitted the FCC to tighten its rules based on competition or diversity (and we submit that it does not), the Commission does not have, and will not collect in this proceeding, evidence of any harms sufficient to satisfy the deregulatory requirements of the Telecom Act and the standard set forth in *Time Warner II*.

a. The record before the Commission does not include sufficient evidence of harm to competition or diversity caused by the existing ownership restrictions.

Section 202(h) requires that the Commission deregulate its ownership rules unless it can demonstrate by sufficient evidence that the rules are necessary in the public interest. Section 202(h) has shifted the burden to the Commission to justify retention of rules. Thus, although there may have been a time when the Commission could promulgate or preserve ownership rules based on its informed speculation that a rule is in the public interest, facts, not social theory, are required today. Here, the record is devoid of evidence showing that the Commission's existing radio ownership limits and market definition produce any harms to competition or diversity.

In the *Further Notice*, the Commission asks, "What economic harms might radio station consolidation bring?"[29] The Commission appears to miss the fact that consolidation already has occurred and that it has had ten years to measure its effects on competition and diversity. Despite the Commission's apparent attempt to muster evidence of harms to competition or diversity, it and vocal opponents of consolidation have yet to produce any empirical data documenting the supposed harms. In June 2000, the Commission concluded its *Biennial Review*,

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[28] *See id*.

[29] *Further Notice* at ¶ 48.

which included an analysis of a detailed FCC staff study on various trends resulting from consolidation in the radio market.[30] On that record, the Commission concluded that it would not be "appropriate" to tighten the local radio ownership limits.[31] Cox is unaware of any evidence of competitive injuries caused by the radio ownership rules that has occurred in the mere twenty-one months since the release of that decision, and Cox doubts the existence of any evidence of a new, widespread threat to competition sufficient to alter the Commission's *Biennial Review* conclusion. To the contrary, the local radio market remains competitive; most of Cox's radio markets could fairly be characterized as intensely competitive.

Not surprisingly, the Commission has failed to identify evidence of widespread harms to competition or diversity flowing from concentration in local radio markets. The *Notice* and the *Further Notice* in this docket express no more than generalized concerns about the possible effects of concentration and about anomalous situations in a few markets. In fact, it is highly relevant that virtually all parties commenting on the *Notice* argued *against* any tightening of the radio market definition. This rulemaking appears to be simply a search for a rationale to justify further ownership rules.

Even if it were true that the current radio ownership restrictions, and especially the radio market definition, result in a few anomalies, the Commission cannot attempt to cure the few anomalies by changing the general rule. The exceptions should not drive the rule particularly given that the rule and the current radio market definition have served the public interest well. It therefore would be unwise to revise the radio market definition due to rare instances of perceived anomalies, and it would be naive to believe that any other radio market definition would not

[30] *Biennial Review Notice of Inquiry*, 13 FCC Rcd 11276 at ¶ 18.

[31] *Biennial Review*, 15 FCC Rcd 11058 at ¶ 60.

produce its own anomalies. If the Commission tightens its current radio ownership restrictions, it would simply be substituting one set of anomalies for a new, possibly worse, set.

Moreover, the mere existence of anomalies resulting from the application of bright-line rules does not provide the "substantial evidence" of competitive harm required by *Time Warner II*. To the contrary, the existence of only a few purported anomalies out of the "thousands" of assignment and transfer applications processed since enactment of the Telecom Act,[32] confirms that, on the whole, the existing radio ownership rules do not produce the types of competitive harms about which the Commission has theorized. Yet, the record in this proceeding makes clear that the Commission lacks a sufficient basis to justify "a tightening of the regulatory screws." Instead, the Commission should address its concerns about any anomalies on a case-by-case basis, wherein it can consider market- and station-specific facts as appropriate.

b. Restricting further consolidation would not benefit the public interest.

No empirical evidence suggests that restricting further consolidation would foster competition and benefit the public interest. To the contrary, any further restrictions on radio ownership would produce unintended, anti-competitive effects. If the Commission tightened its rules, the current dominant radio station owners in each local market would continue to enjoy the economic efficiencies stemming from the common ownership of radio stations, and the smaller radio station group owners would be restricted from acquiring as many radio stations in a market as the current radio market definition would have permitted and achieving the same economic efficiencies. As a result, smaller radio station owners would be disadvantaged (to the benefit of larger radio station groups) and would be prevented by the tightened ownership restrictions from

[32] *See id*. at ¶ 17.

"catching up." Accordingly, modifying the Commission's radio ownership restrictions to curtail common ownership of radio stations would result in long-term, anti-competitive effects that harm, rather than benefit, the public.

c. The Commission's limited authority to review competition issues does not permit its "flagging" policy.

In August 1998, without prior notice or request for public comment, the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by Commission staff, proposed an allegedly "excessive" level of concentration, based solely on market and station revenue estimates provided by BIA. Under this unwritten policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market.[33] Many of the applications flagged by the Commission's staff have been set aside, in a virtual regulatory limbo; at least a small number have been pending for well over one year.

The Commission's flagging policy violates the rather specific directives of Congress in Sections 202(b) and 202(h), and therefore must be rescinded. Last year, when the Commission granted a large backlog of flagged applications, Chairman Powell acknowledged that, in Section 202(b) of the Telecom Act, "Congress established quite plainly the number of stations that could be commonly owned in a local market – and the proposed transfers in all of the flagged cases comply with these numerical caps."[34] Nothing in the Telecom Act or its legislative history suggests that the Commission has the authority to apply to selected assignment and transfer applications a more restrictive set of ownership limits than those established in Section 202(b).

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[33] *Further Notice* at ¶ 18.

Indeed, imposing a market share component to the local radio ownership rules runs counter to Section 202(b), which removed an audience share presumption from the Commission's rules. Moreover, as stated previously, Section 202(h) does not permit the Commission to adopt more restrictive rules. As such, by applying different standards for the processing and evaluation of selected assignment and transfer applications, the Commission is circumventing the Telecom Act's statutory scheme as well as the deregulatory intent of Congress.

Furthermore, the flagging policy cannot be justified on competition grounds. Adding an additional and unpredictable level of review to flagged applications based solely on BIA's estimates of market share is inconsistent with current antitrust policy, which recognizes that market share alone is not an accurate or complete indicator of the actual effects of a transaction on competition.[35] In addition, because flagging subjects an application to an uncertain analysis and an indeterminate delay, the mere risk of flagging reduces the ability of radio station owners to enter into and to obtain financing for transactions that otherwise would have served the public interest.

Already, all broadcast assignment and transfer applications are subject to a statutory 30-day period in which interested parties may file petitions to deny.[36] This 30-day period provides ample time for interested parties, including competitors, consumers and advertisers, to review and comment on the merits of an application. If the Commission's staff has questions

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[34] Separate Statement of Chairman Michael Powell, rel. March 12, 2001, at 1.

[35] *See generally DOJ-FTC Horizontal Merger Review Guidelines* §§ 2-4 (rev. 1997); Address by Joel E. Klein, then-Acting Assistant Attorney General, U.S. Department of Justice, "DOJ Analysis of Radio Mergers," Feb. 19, 1997.

[36] 47 U.S.C. § 309(b) (2001).

concerning an application, the staff should not merely flag it and suspend processing for several months or more. Rather, immediately following the close of the public comment period, the Commission's staff should address such concerns with the applicants affirmatively. Accordingly, the FCC must rescind its flagging policy and put an end to unjustified delays and uncertainty, both of which harm the parties and the listening public.

As an administrative agency, the Commission must not ignore the specific dictates of a statute and must enforce the statute as written.[37] In this case, Congress already has made a policy determination about the proper radio ownership limits, and it has vested the Commission with the power to further "repeal or modify" any ownership rules that it finds to be "no longer in the public interest." In light of the absence of empirical evidence of competitive harm resulting from the existing radio ownership restrictions, the Commission lacks the authority to constrain further consolidation by modifying its ownership restrictions or by imposing new processing guidelines that achieve essentially the same effect.

III. THE FCC SHOULD NOT DUPLICATE THE WORK OF OTHER AGENCIES.

Much of the *Further Notice* discusses the manner in which the Commission should review transactions based on competition and antitrust concerns.[38] The series of questions asked about the relevant product and geographic markets are duplicative of those the Department of Justice would ask pre-merger in evaluating a proposed radio combination, but the Commission does not have the same expertise or resources as the Department of Justice to review transactions for antitrust concerns. Given this duplication of the work of other, more expert agencies, the Commission's proposals are unnecessary. The Department of Justice and state antitrust agencies

[37] *See Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1361 (D.C. Cir. 1988).

continually monitor proposed transactions, including those involving radio stations, and review those that raise antitrust concerns. For example, the Department of Justice has reviewed proposed transactions involving the merger of Clear Channel Communications and AM/FM and the merger of Viacom and CBS for antitrust concerns.[39] The Department of Justice and state antitrust agencies have far more expertise and resources to review these transactions. The Commission should defer to the Department of Justice and state antitrust agencies regarding antitrust concerns in the radio industry.

IV. THE FCC SHOULD NOT CHANGE ITS REGULATORY TREATMENT OF LMAS AND JSAS.

In the *Further Notice*, the Commission requests comment whether it should require parties to seek prior approval of local marketing agreements ("LMAs"), time brokerage agreements ("TBAs") and joint sales agreements ("JSAs") and whether it should treat JSAs as an attributable ownership interest, as it does with LMAs and TBAs.[40] Requiring prior approval of LMAs and TBAs would create a significant administrative burden without a concomitant public benefit and, as the Commission decided in its *Attribution Order*, the attribution of JSAs is not

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[38] *Further Notice* at ¶¶ 40, 42.

[39] *DOJ Proposes Final Judgment in Radio Station Merger*, ANTITRUST LITIGATION REPORTER, Jan. 2001, at 5; *DOJ Requires Clear Channel and AMFM to Divest 99 Radio Stations, Advertising Company, To Proceed with Merger*, ANTITRUST REPORT, July/Aug. 2000, at 11; *Cumulus and Clear Channel Agree to Amended Station Swap and Additional Sales to Clear Channel*, BUSINESS WIRE, July 25, 2000; *DOJ Signs Off on Viacom-CBS Deal*, ELECTRONIC MEDIA, 442000 WL 8176526, May 1, 2000; *EZ Communications, Inc. Announces Department of Justice Approval of Merger,* PR NEWSWIRE, Feb. 28, 1997; Laura Rich, *Justice probes Jacor radio clout; Department of Justice investigates Jacor Communications Inc.'s acquisition of radio stations in Cincinnati, Ohio*, INSIDE MEDIA, June 26, 1996, at 1.

[40] *Further Notice* at ¶¶ 81, 83.

warranted. Cox therefore urges the Commission to maintain its current regulatory policy regarding LMAs, TBAs, and JSAs.

The Commission has recognized the tangible, public interest benefits of LMAs, TBAs, and JSAs.[41] Imposition of additional restrictions would risk eliminating these public interest benefits by delaying implementation of such arrangements or eliminating them altogether.[42] The extensive body of regulation and case precedent that the Commission has developed over the past twenty years provides broadcasters with sufficient notice of what types of practices or combinations of practices result in an unauthorized transfer of control and are prohibited by the Commission,[43] thus rendering a pre-approval requirement unnecessary. As the Commission notes in the *Further Notice*, "Rather than require prior approval of LMAs and TBAs, we could rely on our enforcement authority to require termination of LMAs or TBAs that are contrary to

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[41] *See*, *e.g.*, *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, *Report and Order*, 14 FCC Rcd 12903, ¶ 145 (1999) ("the record shows that a number of television LMAs resulted in public interest benefits. ALTV submitted a study showing that LMAs helped some struggling stations complete construction of their facilities or upgrade them, allowed others to add a local newscast or other local programming to their schedule, and more generally permitted stations to take advantage of operating efficiencies to serve their viewers better. We do not wish to disrupt these public interest benefits."). *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, *Report and Order,* 14 FCC Rcd 1255, ¶ 122 (1999) ("Some JSAs may actually help promote diversity by enabling smaller stations to stay on the air."); *Revision of Radio Rules and Policies, Report and Order,* 7 FCC Rcd 2755, ¶ 58 (1992) (stating that TBAs "provide separately owned stations with efficiencies similar to those available to commonly owned stations by permitting them to function cooperatively via joint advertising sales, shared technical facilities and joint programming arrangements.").

[42] *See generally Revision of Radio Rules and Policies*, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7183, 7192 (1994) (noting that precluding stations from entering into such arrangements could unduly restrict stations' flexibility to adapt to changing market conditions.).

[43] If a party wishes to seek a declaratory ruling on the legality of an LMA, however, it should be permitted to do so.

the public interest because of their effect on competition."[44] Cox agrees. Reliance on the Commission's enforcement powers would be far more efficient than requiring the Commission's staff to preapprove every LMA or JSA.

Cox also urges the Commission not to reconsider its recent decision in the *Attribution Order* to exempt JSAs from attribution. The Commission decided, "Based on the record in this proceeding, we do not believe that agreements which meet our definition of JSAs convey a degree of influence or control over station programming or core operations such that they should be attributed."[45] Yet, the Commission asked whether it should "reconsider this blanket exemption to attribution in light of the new local radio ownership policy we intend to adopt?"[46] Given the reasoning behind the Commission's decision that JSAs should not be attributable, the adoption of new local radio ownership rules should be irrelevant to the status of JSAs. Accordingly, the Commission should maintain its prior decision that JSAs are not attributable interests.

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[44] *Further Notice* at ¶ 81.

[45] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, *Report and Order*, 14 FCC Rcd 12559, ¶ 122 (1999).

[46] *Further Notice* at ¶ 83.

CONCLUSION

The Commission's decision in this rulemaking requires a careful consideration of the scope of its authority and whether there is an evidentiary basis to justify modifying the local radio ownership rules. Cox respectfully submits that a decision to revise the definition of radio markets or to tighten the local radio ownership rules would exceed the scope of the Commission's authority under the Telecom Act. Cox also submits that no reason exists to overturn the Commission's current regulatory policy regarding LMAs, TBAs, and JSAs. Instead, retention of the current rules and policies regarding local radio ownership and LMAs, TBAs, and JSAs would preserve Congress's policy objectives and ensure continued benefits to the public.

Respectfully submitted,

COX RADIO, INC.

By: /s/ Kevin F. Reed
Kevin F. Reed
Elizabeth A. McGeary
Nam E. Kim

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Its Attorneys

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